No. 1384

United States Circuit Court of Appeals

For the Ninth Circuit

EASTERN AND WESTERN LUMBER COMPANY,
(DEFENDANT, AND) PLAINTIFF IN ERROR,

vs.

PETER A. RAYLEY,
(PLAINTIFF, AND) DEFENDANT IN ERROR.

Upon Writ of Error to the United States Circuit Court for the District of Oregon.

Brief of Plaintiff in Error

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(Defendant, and) Plaintiff in Error,

v.

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(Plaintiff, and) Defendant in Error.

Upon Writ of Error to the United States Circuit Court for the District of Oregon.

Brief of Plaintiff in Error.

This is an action brought by the defendant in error, as plaintiff, against the plaintiff in error, as defendant, to recover damages for personal injuries sustained as the result of alleged negligence on the part of the plaintiff in error. Inasmuch as in the record the parties are repeatedly mentioned as "plaintiff" and "defendant," in order to avoid any confusion we will continue such designations, and hereafter in this brief the defendant in error will be styled the "plaintiff" and the plaintiff in error will be designated as the "defendant," as they were originally.

STATEMENT OF THE CASE.

Plaintiff, in his complaint, alleges in substance that defendant, a corporation organized under the laws of the State of Oregon, operated a large sawmill at Portland, Oregon, and also owned and operated a logging railroad, about eleven miles long, in the State of Washington, where it was operating a large logging camp and hauling its logs on said railroad from the camp to the Columbia River. That on the day of the injury complained of, plaintiff was employed as fireman upon one of defendant's locomotive engines engaged in hauling logs on said road. That the said railroad was negligently and carelessly constructed, in that, among other things, the ties were rotten and the rails were laid inside of the stringers; and that, as a result, the track collapsed under the weight of the locomotive on which plaintiff was employed, which fell upon him and greatly injured him by crushing one of his legs and otherwise.

Defendant, in its answer, denied the material averments of the complaint. It further alleged, among other things, that plaintiff was not employed by defendant upon the locomotive at the time of the injury, and that he went on the same without any order, permission or request of defendant, but simply for his own convenience and pleasure, and not in the discharge of any business for defendant, and that he was guilty of contributory negligence in being upon the locomotive at the time, precluding his recovery. It further alleged that said road was a logging railroad for the purpose of hauling logs from defendant's logging camp, and that plaintiff was fully acquainted with the character and condition of the road, and with its

manner of construction and operation, including the portion of the road where the accident occurred, and that said last-named portion was only temporary, and that in going upon said locomotive engine plaintiff assumed all the risks and dangers of so doing.

The questions involved are set forth in detail in the specifications of error. The first five of these are exceptions taken to the rulings of the trial court in the admission of evidence, and the remainder are exceptions to instructions given by the court and to the refusal of the court to grant certain instructions requested by defendant.

It is contended that plaintiff was not employed by the defendant as fireman, as claimed by him, and the evidence clearly supports this view. It is further contended by defendant that plaintiff was fully acquainted with the character and condition of the track and the manner of its construction, and assumed the dangers of riding upon the locomotive with the track in that condition, and that the circuit court erred in taking away from the jury the consideration of this question.

The road in question was a logging road, intended only for defendant's own use, and the portion of the track where the accident occurred was only a temporary spur; and it is urged that error was committeed in not giving the instructions requested by defendant covering these features of the case, and also that the court erred in not granting the instructions requested by defendant as to the nature and extent of the requirements by which it was bound in its construction of the road.

The jury rendered a verdict for the plaintiff for $9250 —an award excessive from any point of view; and on

Plaintiff and Stewart having directly contradicted each other, the question is, which is entitled to credit? In other words, has the plaintiff's statement any foundation in fact? What corroboration of his statement is there?

Plaintiff says that he went to where the logging train was in order to find employment; he was there walking around for nearly two hours. Henderson, Stewart and Fahey, any one of whom could have given him employment, were there. He made no application to any one to be employed. Meanwhile the business of the day had commenced. One train of cars had been dispatched, and had returned for the second load. Plaintiff was standing idly by, and during all this time he had indicated no desire for employment. Moreover, Stewart, the foreman, had made arrangements with Arthur Shepardson, the engineer, to do the firing for that day. Stewart testifies to this. (Record, p. 334.) Arthur Shepardson, the engineer, testifies to the same effect. (Record, p. 156.) Now, these two uncontradicted witnesses testify that arrangements had been made for firing that day? Is it probable that Stewart would have employed plaintiff to do what he had engaged Shepardson to do, and which employment Shepardson had in fact entered upon by firing during the first trip and for the second trip of the train.

When the accident occurred, Shepardson was perfectly familiar with the engine, and previous to the date of the accident had at the same time frequently acted as both engineer and fireman. (Record, p. 155.) Shepardson further significantly states that there was no especial occasion for the employment of a fireman on that day. (Rec-

ord, p. 158.) He also says (Record, p. 157) that he did not know anything about plaintiff having been employed as fireman. If he had been *employed* plaintiff would undoubtedly have called Shepardson's attention to that fact when he boarded the engine. Plaintiff in fact did no firing whatever, nor had he ever acted as fireman on any of defendant's locomotives. (Record, p. 74.)

Mr. Stewart is corroborated by the following witnesses:

Ralph Adams testifies that plaintiff did not go near Stewart on his way to the locomotive. (Record, p. 303.) He further says that he saw plaintiff at the Good Samaritan Hospital on the 23d of June, and plaintiff said, "There "is something strange about me just getting on there to "ride down, only going a little ways, and the engine tipping "over." (Record, p. 305.)

Dan Fahey had a conversation with plaintiff after he was hurt, and after he was taken to the storehouse, in the course of which plaintiff requested Fahey to take care of his young brother and send him back home, and to see about some money he (plaintiff) had, etc.; and in this conversation with Fahey plaintiff stated that it was his fault for getting hurt,—that he ought not to have been there. (Record, pp. 239, 240.)

Oliff Shepardson (a brother of Arthur), who took care of plaintiff until he reached the hospital, states that plaintiff told him that it was his (plaintiff's) own fault,—that he had no business to be on the engine. (Record, p. 165.)

J. W. Hall testifies that he called on plaintiff about eleven o'clock of the day on which plaintiff was injured, in company with Johnny Neap, and Johnny said to him,

"How are you feeling, Pete?" He answered, "I am feeling "awful bad, Johnny. I have got nobody to blame, only "myself." (Record, p. 276.) This testimony is confirmed by Mr. Neap (Record, p. 287), who adds that plaintiff said: "I had no business to be on the locomotive."

Dr. Henry C. Jefferds was the physician who attended plaintiff in the hospital. He testifies: "The first conver- "sation was within a week, I should say, of the injury. "He told me that he was a stationary engineer, that is, a "donkey engineer, and I then asked him how he happened "to be on the train. He said he wasn't working that day, "and he was just riding down the line." (Record, p. 247.)

"Q. Was there any subsequent conversation on the "same subject with Mr. Rayley?

"A. Yes, my impression is that he spoke about it sev- "eral times; and once I remember particularly, because I "was joking with him, and said, 'Well, if you had been "going to church, as you ought to have been, you wouldn't "have been hurt.' And he said, 'No,' that he was just rid- "ing down the line, as he expressed it; that he was not "working." (Record, p. 248.)

Two other persons were on the locomotive to ride down the line when the accident happened, but they and the engineer escaped without injury.

The following witnesses were called to corroborate the plaintiff:

Ervin Rayley, a brother of plaintiff:

"Q. Did you see Pete when he started down towards "the engine?

"A. Yes, sir.

"Q. Did you see him speak to anybody on the way "down there?

"A. Yes, sir. He stopped and spoke to Mr. Stewart "for a few minutes."

(Plaintiff's testimony is that Stewart spoke to him.)

"Q. And then what did he do?

"A. He went immediately and got onto the engine, "the locomotive. (Record, p. 151.)

He also says when called in rebuttal:

"Q. I will ask you to state when you went up, or im- "mediately after this accident happened if you went up "to the engine?

"A. Yes, sir.

"Q. Did you see Dave Stewart there—superintendent?

"A. Yes, sir, I did.

"Q. I will ask you to state if this conversation occurred "when you came up there; if you said to Stewart, 'Was "Pete on the engine?'

"A. Yes, sir.

"Q. And if he did reply thereto, 'Yes, I told him to "fire?'

"A. Yes, sir." (Record, pp. 378, 379.)

This testimony is put into the mouth of the witness by counsel, and it is singular that he asked Stewart if Pete was on the engine, when he swore that he had just seen him go aboard of the engine. He also testifies that he was present when some of the witnesses for defendant testified that plaintiff made statements to them as hereinbefore mentioned, and that he did not hear plaintiff make such statements. This, of course, amounts to little or nothing as evidence. This lad's anxiety for his brother may be some excuse for his recklessness.

Plaintiff brought two young men into court towards the end of the trial, to testify in rebuttal; and this is what they said and the way they said it. They had stated that they were in the hospital when plaintiff was there, and that their cots were in the immediate vicinity of the one occupied by plaintiff.

Paul Plebuch: (Questions by counsel for plaintiff.)

"Q. Did David E. Stewart, or D. E. Stewart, the last "witness on the stand, say, in your presence and hearing, "and in the presence of Oliver Workman, and in Pete's "presence, 'Pete, you remember me telling you to fire on "the day of your accident?' And did Rayley answer "thereto, 'Yes?' And did Stewart then say, 'I am sorry "that you were so seriously injured. We are all in sym- "pathy with you. We tried to get you out before you "were so badly burned, but the steam was so hot we could "not get to you?"

"A. Yes, sir." (Record, p. 345.)

Oliver Workman: (Questions by counsel for plaintiff.)

"Q. I will ask you to state if, at that time, in the "presence of plaintiff, Rayley, and Paul Plebuch, and "yourself, the following conversation took place: Ques- "tion by Mr. Stewart: 'Pete, do you remember me telling "you to fire the day of your accident?' And did Rayley "answer thereto, 'Yes?' Then did Stewart reply, 'I am "very sorry that you were so seriously injured. We are "all in sympathy with you. We tried to get you out before "you were so badly burned, but the steam was so hot we "could not get to you.

"A. Yes, sir." (Record, p. 349.)

Stewart emphatically denies that he had any such con-

versation with plaintiff. (Record, p. 342.) It seems to us that the testimony of these two witnesses bears upon its face the impress of fabrication. It is incredible that Stewart should rush into the presence of plaintiff, and at once after saying, "Hello, Pete," say what these witnesses relate—as though he was anxious to furnish testimony against the defendant, and himself assume the blame and responsibility of the accident. What possible motive could he have had in thus accusing himself? It will be noticed that plaintiff does not testify to any conversation with Stewart at the hospital. Plaintiff of course denies that he made any of the statements to defendant's witnesses, as testified to by them.

This is substantially the testimony relating to the employment of plaintiff by defendant on the day of the injury.

Taking into consideration that plaintiff was employed on another job; that Shepardson had frequently acted as both fireman and engineer, and had been especially employed to do so on this particular day; that, according to Shepardson, there was no occasion for the employment of a fireman; and further taking into consideration all the other circumstances of the case at the time of the alleged employment, as disclosed by the evidence, it seems to us that any reasonable man must conclude the truth to be as plaintiff himself stated to several witnesses, that he was on the engine for the purpose of riding down to camp, like the other two men on the engine, and that he was not employed as fireman by defendant. Curiosity to see the record run, which brought many others to the scene, readily accounts for plaintiff's presence. When he had seen

all that he desired, to avoid walking, he boarded the locomotive to ride back to camp, intending probably to then go and help Darling fix his donkey engine. From plaintiff's own statement (Record, pp. 77 and 82), it would appear that there was some kind of an understanding between him and Darling that he would help the latter to fix his donkey engine. Oliff Shepardson states (Record, p. 183) that plaintiff told him that he got on the engine to go down where Darling was working on the donkey-engine; and in order to reach the place where Darling's donkey-engine was from the place where the accident occurred, plaintiff states that it was necessary to go past the camp. (Record, pp. 116, 117.)

SPECIFICATIONS OF ERRORS.

The following are the specifications of errors relied upon by the plaintiff in error, and which are intended to be urged by it on the writ of error as grounds for the reversal of the judgment of the Circuit Court. These specifications of error are identical with the first sixteen (numbered respectively from I to XVI inclusive) of the errors suggested under the heading, "Assignment of Errors" in the printed Transcript of Record herein, commencing at page 432 thereof; to wit:

I.

During the trial of said action plaintiff was called as a witness in his own behalf, and on his redirect examination was asked the following question:

"Q. When they first went up there from the camp, "the object and purpose was to put all men at work that

"could possibly work up there. Is that the way you under-
"stand it?

"A. That is the way they was to do, yes."

Defendant objected to this question and answer as immaterial, not proper re-examination and as leading, and moved to strike out the answer.

The objection was overruled by the court and the defendant then and there excepted thereto and said exception was duly allowed by the court.

That the court erred in allowing said witness to answer said question and in denying defendant's motion to strike out said answer.

II.

During the trial of said action Arthur Shepardson was called as a witness for the defendant and on his direct examination was asked the following question:

"Q. Were you in fact paid for your services in both
"capacities?"

To this question the plaintiff objected as incompetent and immaterial and said objection was sustained by the court, and said witness was not allowed to answer said question.

That said defendant then and there excepted to the ruling of the court, and said exception was duly allowed by the court.

That said question was propounded in the following connection:

"Q. On the day in question, April 23, 1905, when Ray-
"ley was injured, in what capacities were you operating
"that engine?

"A. As engineer and fireman.

"Q. Both as engineer and fireman?

"A. Yes.

"Q. Prior to that time you had been operating it as "engineer and fireman. Did you operate it the day before?

"A. I did the day before, yes.

"Q. Yourself the day before too, and how about com- "pensation?

"A. Well, there was nothing said about it."

The contention of the plaintiff was that he had been employed as fireman on such engine. The contention of the defendant was that he was not so employed, that Arthur Shepardson was acting both as fireman and engineer, had done so before, and was in fact paid for his services, and that in order to place all the circumstances before the jury the defendant was entitled to ask the foregoing question.

That the court erred in not allowing said witness to answer said question.

III.

During the trial of said action Dan Fahey was called as a witness for the defendant and on his direct examination was asked the following question:

"Q. I will ask you whether Arthur Shepardson made "any request to you for a fireman on the engine?"

Plaintiff objected to said question as incompetent and immaterial, and said objection was sustained by the court.

The defendant duly excepted to the ruling of the court and said exception was then and there allowed by the court. That said question was propounded immediately following the following question and answer:

"Q. Now, I will ask you, who was the locomotive en-
"gineer that day—Arthur Shepardson?

"A. Arthur Shepardson was on it."

That the said witness Dan Fahey had previously testified that he was woods foreman and was the assistant of Stewart, the superintendent, and in the absence of Stewart, the superintendent, had charge of the operation of the trains and of the operation in the woods.

Plaintiff claimed that he was employed as a fireman on said engine. The defendant's contention was that Shepardson was acting as fireman and engineer, being employed and paid in both capacities, and that it was pertinent to ask the witness whether Shepardson had requested the employment of a fireman.

That the court erred in not allowing said witness to answer said question.

IV.

During the trial of said action Dr. Henry C. Jefferds was called as a witness for the defendant and on his cross examination was asked the following questions:

"Q. Now, Doctor, didn't you advise him to settle for
"a leg with the company?

"Q. Didn't you advise him that he could get a leg at
"the Portland Artificial Limb Company?"

These questions were objected to as irrelevant, immaterial and not proper cross-examination. Said objections of the defendant were overruled by the court and the witness was allowed to answer the same.

Defendant then and there duly excepted to the rulings of the court and said exceptions were severally allowed.

On his direct examination the witness had testified that the plaintiff had been under his charge and that he had talked with him regarding the circumstances under which he came to be injured and how he came to be upon the logging train at the time. The witness, however, was not asked and did not testify upon his direct examination as to the nature or character of plaintiff's injuries or in respect to any settlement or proposed settlement with the company.

That the court erred in allowing said witness to answer said questions and in overruling defendant's objection thereto.

V.

During the trial of this action Henry C. Jefferds was called as a witness by the defendant and on his cross-examination was asked the following question:

"Q. Did you tell him (plaintiff), in a conversation "that you had been talking with Henderson and that you "thought you could get him a limb, or words to that effect."

Defendant objected to the question as irrelevant, immaterial and not proper cross-examination, but said objection was overruled by the court and said witness was allowed to answer said question.

To the ruling of the court defendant then and there excepted and said exception was allowed by the court.

The witness answered said question as follows:

"A. I think he asked me once if Mr. Henderson had "said anything to me about what he would do for him; "and I think I told him that Mr. Henderson had told me "that the company would give him a limb."

The witness testified upon his direct examination that

he attended plaintiff as a physician and was regularly retained by defendant, and further testified in respect to certain conversations occurring between him and the plaintiff, as to how he came to be injured and to be on the logging train. He was not asked upon such direct examination and did not testify regarding the nature or character of plaintiff's injuries or in respect to any settlement with the company, or as to any conversation with Henderson, or about an artificial limb.

That the court erred in allowing said witness to answer said question and in overruling defendant's objection thereto.

VI.

When said instructions of the court were given to the jury and before the jury retired for deliberation the defendant duly excepted to the action of the court in instructing the jury as follows:

"But I instruct you that there has been no evidence "adduced from this case in which it can be reasonably "inferred that plaintiff assumed any risk or hazard of "his employment, if employed in the capacity as he alleges "in his complaint, other than such as was ordinarily inci- "dent to such employment, and you will therefore dismiss "from your minds the consideration of the second defense; "that is, of whether plaintiff knew of the condition of the "roadbed, and therefore assumed the risk of working upon "such locomotive engine," upon the ground that the same is contrary to law and an exception was then and there allowed the defendant to the giving of said instruction.

That the court erred in giving said instruction to the jury.

VII.

When said instructions of the court were given to the jury and before the jury retired for deliberation, the defendant duly excepted to the action of the court in instructing the jury as follows:

"If you find that the roadbed was unsafe and unfit for "the use to which it was put, the fact that it was only "temporary would not excuse the defendant from using "ordinary care in making it safe. If this roadbed was a "part of the defendant's equipment for the purpose of "carrying on its business the rule that ordinary care "should be used by defendant in constructing it would "equally apply, namely, that it should use ordinary care "to see that it was reasonably safe the same as though it "were a permanent structure. The question, therefore, is "not whether such roadbed or track was temporary or "otherwise, but whether it was a part of defendant's equip-"ment used by defendant in the transaction of its ordinary "business of logging, and if you find that it was, then I "instruct you that it was the duty of the defendant to use "ordinary care to see that such roadbed or track was rea-"sonably safe, and a failure to use such ordinary care, if "you find there was such failure, would warrant you in "finding the defendant negligent in that regard," upon the ground that the same is contrary to law and an exception was then and there allowed by the court to the giving of such instruction.

That the court erred in giving said instruction to the jury.

VIII.

That when said instructions of the court were given to the jury, and before the jury retired for deliberation, the defendant duly excepted to the action of the court in instructing the jury as follows:

"If you find that the plaintiff was injured through the "negligence of defendant, as in his complaint set forth, "and that he has not contributed to his injury by any "negligence on his part, then you should find the amount "of damages he has sustained. In estimating his damages, "you may take into consideration the extent and character "of his injuries as shown by the evidence, the pain and "suffering that plaintiff has endured by reason thereof, the "loss of earnings caused thereby; and if you should further "believe from the evidence that plaintiff will continue to "suffer from these injuries, then you may consider such "future pain and suffering and future loss of earning "capacity, if any, as you find will naturally and probably "result from such injuries and award the plaintiff such "compensatory damages as under all the circumstances of "the case you may deem just. In determining the loss of "earning capacity, if you should determine from the evi- "dence that plaintiff has been permanently injured, you "may consider the expectancy of plaintiff's life, based "upon the evidence and upon your own experience and "knowledge as to such matters," upon the ground that the same is contrary to law, and an exception was then and there allowed by the court to the giving of such instruction.

That the court erred in giving said instruction to the jury.

IX.

Prior to the argument to the jury the defendant duly requested in writing that the court should give to the jury the following instruction (the same being numbered six of the instructions requested by the defendant as above set forth):

"It is not every one who suffers loss from the negli-"gence of another who may recover. Negligence to be "actionable must occur in the breach of a legal duty, owing "from the negligent party to the party sustaining the loss."

The court refused to give said instruction to the jury, and the defendant prior to the retiring of the jury for deliberation, duly excepted to the action of the court in refusing to give said instruction to the jury, and said exception was then and there allowed.

That the court erred in refusing to give said instruction to the jury.

X.

Prior to the argument to the jury the defendant duly requested in writing that the court should give to the jury the following instruction (the same being number 11 of the above instructions requested by the defendant):

"Even though you find from the evidence that the "plaintiff was employed at the time of his injury as a "fireman on defendant's locomotive, plaintiff cannot "recover unless you find that his injury resulted from the "negligent and careless manner in which such road was "constructed by defendant."

The court refused to give said instruction to the jury and defendant prior to the retiring of the jury for deliberation, duly excepted to the action of the court in refusing

to give said instruction to the jury and said exception was then and there duly allowed by the court.

That the court erred in refusing to give said instruction to the jury.

XI.

Prior to the argument to the jury the defendant duly requested in writing that the court should give to the jury the following instruction (the same being number 12 of the instructions requested by the defendant as above set forth):

"Even though you should find that the plaintiff at the "time of his injury was employed as fireman on defend- "ant's locomotive, defendant was not an insurer of the "safety of its track; but was required to exercise ordinary "care in building the same and keeping it in repair, and "if it has used such ordinary care defendant is not liable "from a defect in such track or roadbed not discoverable "by such ordinary care."

The court refused to give said instruction to the jury and the defendant prior to the retiring of the jury for deliberation, duly excepted to the action of the court in refusing to give said instructions to the jury, and said exception was then and there duly allowed.

That the court erred in refusing to give said instruction to the jury.

XII.

Prior to the argument to the jury the defendant duly requested in writing that the court should give to the jury the following instruction (the same being number 13 of the above instructions requested by the defendant):

"Even though you find that plaintiff at the time of his

"injury was employed as fireman on defendant's locomo-
"tive, the mere fact that he was injured in consequence of
"a defective track or roadbed will not entitle him to a
"recovery, but plaintiff must in addition show that such
"defect resulted from the failure of the defendant to exer-
"cise ordinary care in the construction of its track or
"roadbed and in the selection of the materials of which
"the same was composed or in the employment of persons
"reasonably skillful and competent to construct such a
"roadbed."

The court refused to give said instruction to the jury and the defendant prior to the retiring of the jury for deliberation duly excepted to the action of the court in refusing to give said instruction to the jury, and said exception was then and there duly allowed.

That the court erred in refusing to give said instruction to the jury.

XIII.

Prior to the argument to the jury the defendant duly requested the court in writing to give the following instruction to the jury (the same being number 14 of the instructions requested by the defendant as above set forth):

"Defendant is not required to adopt extraordinary tests
"for the discovery of defects in the ties or other materials
"of its track or roadbed, but it fulfilled its whole duty
"to the plaintiff, even though you should find that he was
"employed as a fireman on defendant's locomotive at the
"time of the injury, if it adopts such tests as are ordin-
"arily used by prudently conducted railroads and sur-
"rounded by like circumstances."

The court refused to give said instruction to the jury.

and the defendant prior to the retiring of the jury for deliberation duly excepted to the action of court and said exception was then and there duly allowed by the court.

That the court erred in refusing to give said instruction to the jury.

XIV.

Prior to the argument to the jury the defendant duly requested in writing that the court should give to the jury the following instruction (the same being instruction number 15 requested by the defendant as hereinbefore set forth):

"The jury in considering the question of negligence in "the construction and operation of the road must have "regard to the fact that the road was a temporary road "constructed and operated exclusively for the transporta- "tion of logs, and that defendant would only be required "to construct and operate a road with ordinary care suit- "able for such purposes."

The court refused to give said instruction to the jury and the defendant prior to the retiring of the jury for deliberation duly excepted to the action of the court in refusing to give said instruction and said exception was then and there duly allowed by the court.

That the court erred in refusing to give said instruction to the jury.

XV.

Prior to the argument to the jury the defendant duly requested in writing that the court should give to the jury the following instruction (the same being instruction number 17 requested by the defendant as hereinbefore set forth):

"I instruct you to return a verdict for the defendant."

The court refused to give said instruction to the jury and the defendant prior to the retiring of the jury for deliberation duly excepted to the action of the court in refusing to give said instruction and said exception was then and there duly allowed by the court.

That the court erred in refusing to give said instruction to the jury.

XVI.

When the instructions of the court were given to the jury, and before the jury retired for deliberation, the defendant duly excepted to the action of the court in giving the following instructions to the jury:

"If you find that the roadbed was unsafe and unfit for "the use to which it was put, the fact that it was only "temporary would not excuse the defendant from using "ordinary care in making it safe. If this roadbed was a "part of the defendant's equipment for the purpose of "carrying on its business the rule that ordinary care "should be used by defendant in constructing it would "equally apply, namely, that it should use ordinary care "to see that it was reasonably safe the same as though it "were a permanent structure. The question, therefore, is "not whether such roadbed or track was temporary or "otherwise, but whether it was a part of the defendant's "equipment used by defendant in the transaction of its "ordinary business of logging, and if you find that it was, "then I instruct you that it was the duty of the defendant "to use ordinary care to see that such roadbed or track "was reasonably safe, and a failure to use such ordinary "care, if you find there was such failure, would warrant

"you in finding the defendant negligent in that regard" (the same being one of the instructions requested by the plaintiff as above set forth), for the reason that the same is contrary to law.

That the court erred in giving said instruction to the jury.

ARGUMENT

I.

First Specification of Error.

We contend that the court erred in allowing plaintiff to answer the following question:

"When they first went up there from the camp the "object and purpose was to put all men at work that "could possibly work up there. Is that the way you "understand it?

"A. That is the way they was to do. Yes."

Defendant's counsel objected to this question and answer as immaterial, as not proper re-examination, and as leading, and moved to strike out the answer. The objection was overruled by the court and an exception allowed. (Record, pp. 389, 432.) According to this witness and others, a large number of persons had assembled where the cars were to be loaded, to witness the proceedings. It is difficult to understand to whom "they" in this question refers; but the evident purpose of the question was to make the witness say that all the men assembled there were there for the purpose of being employed if they possibly could be. The first, and, as it seems to us, a fatal objection to this question is that it was directly leading. Plaintiff's counsel stated to a witness the testi-

mony he wanted and simply asked the assent of the witness to the statement. The probable object of the inquiry was to show that other persons were employed, in order to prove that plaintiff was employed. The testimony was clearly irrelevant and immaterial for that purpose; that numerous other persons were employed to handle logs would not prove or tend to prove that plaintiff was employed as a fireman. Moreover, the question called for the opinion or understanding of the witness, and was thus manifestly improper. If material at all or admissible at all, his knowledge should have been called for, not his opinion, and it does not appear that he knew or could have known either the intention of the managers for the defendant, or the desires or intentions of the men assembled.

But while, in a legal sense, the question may have been immaterial, it cannot be pretended that this opinion of the witness is of any value as evidence. It was intended to bolster up his own claim that he was employed by the defendant, which was the chief issue in the case; and it must have had an influence upon the jury, prejudicial to defendant, in determining the main issue.

II.

Second Specification of Error.

Arthur Shepardson was the engineer upon the locomotive by which plaintiff was injured, and at this time had already acted and was acting as fireman and engineer. Plaintiff claimed that he had also been employed to act as fireman on said locomotive. It must be evident that both were not so employed. Shepardson, as a witness, was

asked whether in the past he had been paid both as fireman and engineer when he acted in the dual capacity, and he had sworn that he had been so paid. (Record, p. 156.) He was now asked this question by defendant's counsel: "Were you in fact paid for your services in both capaci-"ties?" Plaintiff objected to this question, and the objection was sustained by the court. (Record, pp. 390, 433.)

It seems to us that this was clearly error. Defendant had a right to show by all the circumstances bearing upon the point that Shepardson was the fireman, and not plaintiff. Nothing can be clearer than that if defendant paid Shepardson for his services as fireman, it would tend to show that he had been employed as such fireman. Stewart and Shepardson both testify that Shepardson was employed as fireman, but plaintiff claims that this testimony is false. This question, to the exclusion of which we object, gave the defendant a right to fortify such testimony by showing that Shepardson had been paid for his services as fireman. The payment of Shepardson was a part of his employment and part of the *res gestae*. Plaintiff might offer rebutting testimony if he could, or might comment on the testimony, but defendant clearly had a right to show the final consummation of Shepardson's employment, which itself was a most material fact.

III.

Third Specification of Error.

It appears in the evidence that Dan Fahey was assistant superintendent and had the right to employ men. Arthur Shepardson was the engineer on the logging train. Fahey was asked this question by defendant's counsel: "I

will ask you whether Arthur Shepardson made any request "to you for fireman on the engine?" Plaintiff objected to the question, and the objection was sustained and an exception allowed. (Record, pp. 391, 434.) We think this evidence was clearly competent upon the controverted point as to who was fireman. Plaintiff and Stewart directly contradicted each other in this matter of employment; and defendant had a right to give in evidence any pertinent circumstance to corroborate Stewart. And, of course, the plaintiff had the same right as to himself. Now, if Shepardson, the engineer, did not ask Fahey for a fireman, it is evidence tending to show either that Shepardson, the engineer, did not need a fireman, or that one had been employed. This ruling would, of course, exclude a similar question to the president or superintendent. It is not at all probable that the engineer would undertake to run the train without some arrangement to fire it. Either a fireman had been provided, or Shepardson would naturally have made a request for a fireman; and the fact that no such request was made is a fact from which the jury might properly infer that an arrangement for firing had been made, as testified to by Stewart and Shepardson.

IV.

Fourth and Fifth Specifications of Error.

Upon his cross-examination, Dr. Henry C. Jefferds, a witness for the defendant, was asked the following questions:

"Q. Now, doctor, didn't you advise him to settle for "a leg with the Company?

"Q. Didn't you advise him that he could get a leg at "the Portland Limb Company?

"Q. Did you tell him (plaintiff), in a conversation "that you had been talking with Henderson and that you "thought you could get him a limb, or words to that "effect?"

These questions were objected to by defendant as irrelevant, immaterial and not proper cross-examination. The objections were, however, overruled, exceptions being taken to the rulings; and the witness was directed to and did answer the questions. This action of the trial court constitutes the fourth and fifth assignments of error. (Record, pp. 392, 393, 435, 437.)

The testimony of this witness is to be found in the Record (pp. 245-263). Upon his direct examination, after stating that plaintiff had been under his charge, he testified to conversations had with him regarding the circumstances under which he came to be injured, and as to how he came to be upon the logging train. The witness was not examined regarding the nature or character of plaintiff's injuries, or as to any settlement or proposed settlement with the company.

Upon his cross-examination the witness stated, in answer to questions propounded to him, that he had been employed by defendant to attend plaintiff and that he was regularly retained by defendant as its physician and surgeon. Such questions were perfectly proper, but the questions above set forth were clearly outside the legitimate scope of cross-examination. The statutes of Oregon (Bellinger and Cotton's Annotated Codes and Statutes of Oregon, Sec. 849) provide:

"§849. The adverse party may cross-examine the wit-
"ness as to any matter stated in his direct examination,
"or connected therewith, and in so doing, may put leading
"questions; but if he examine him as to other matters,
"such examination is to be subject to the same rules as
"a direct examination."

See, also,

Houghton v. Jones, 1 Wall. 706.

Seymour v. Lumber Co., 58 Fed. Rep. 960.

V.

Sixth and Eighth Specifications of Error.

Among other instructions to the jury the court gave the following: "But I instruct you that there has been "no evidence adduced in this case from which it can be "reasonably inferred that plaintiff assumed any risk or "hazard of his employment, if employed in the capacity "he alleges in his complaint, other than such as was ordin-
"arily incident to such employment, and you will, there-
"fore dismiss from your minds the consideration of the "second defense; that is, of whether plaintiff knew the "condition of the roadbed and, therefore, assumed the risk "of working upon such locomotive."

Exception was taken to this instruction by the defendant at the time it was given, and the exception was allowed. (Record, pp. 413, 438.)

We submit that upon the pleadings and evidence in the case this instruction was clearly erroneous and highly prejudicial to the rights of defendant. By reference to pages 22 and 23 of the record, the court will see that defendant in its answer sets up as a defense that plaintiff

knew all about the railroad on which he was hurt, and all about its stringers, ties, rails and general construction, and that it was a temporary road, made and constructed for logging purposes. Plaintiff denies this in his reply, which made an issue of fact in the case. It cannot be doubted that defendant had a right to prove this defense, if it could, for the purpose of showing that plaintiff assumed the risk of working on such a road (if he was at work, as he claims, and not riding for his own convenience), and also to show contributory negligence.

The court told the jury that there was no evidence before them to support this defense. In this the court was mistaken, as the record clearly shows. Plaintiff had been employed by defendant as engineer upon a donkey engine for about a year on other portions of defendant's logging road. He knew that these roads were temporary structures in the forest for logging at some point, and that when the logging was finished at that point they were moved to another place for the same purpose. He knew they were not permanent but temporary and movable roads; he also knew that the road on which the accident occurred was a new spur track, and had never been used until the day of the accident. Upon his direct examination plaintiff testified (Record, p. 51):

"Q. This particular part of the road upon which this "engine was run, what was it—a new spur?

"A. Well, they had just built it, and there was a lot "of logs lying in there."

And again (Record, p. 52), he states:

"Q. What I am getting at is, how many donkey engines "did they have up there near that track?

"A. There was but one at that time. *They had just "built that track. It hadn't been used before this time."*

His employment as engineer of a donkey engine brought plaintiff into intimate relation with these spur tracks, and he necessarily was familiar with their construction. His own donkey engine was located upon a spur track of precisely the same character as the one in question. He testifies (Record, p. 75):

"Q. That is what I mean: How far away was your "donkey engine, the one you ran?

"A. It was a mile or more away.

"Q. Was it on the main track, or a spur?

"A. It was a spur, just the same as the one we was "working on."

The evidence otherwise shows that plaintiff had personal and particular knowledge of the construction and condition of this spur track. Plaintiff, in his testimony (Record, p. 72), after stating that he was about ten steps from the engine when he was ordered to go aboard, was asked the question, "What had you gone down there for?" A. "I just walked around there, same as I had been walk-"ing before. When I first went up there I took a stroll "kind of up like this, *came up the track,* took a stroll "around this way, came around like this, and came back "again, and went up by the water barrel; and I stood "there; and at the time I was going around here, though, "I went very slow, stopped several times. I came back "up to here then, and I stood there I guess about twenty "minutes before I walked from there back here." This statement clearly shows that plaintiff must have known as much about the road as anybody could know from

inspection. He says repeatedly that he came up the track, which means that he came up from his camp to where the logging train was on the track, and, of course, must have seen it; besides, it seems he walked round and round in the immediate vicinity of where the accident occurred, and if his eyes were open he could not avoid seeing the condition of the road. Plaintiff also testified (Record, p. 84) that he walked up the track; he also states (Record, p. 85) that he walked across the track and back as he came up to the water barrel. When we add to these circumstances the fact that the plaintiff hung around where the work was going on from about 7 o'clock until 8:40 o'clock, a period of nearly two hours, and that according to his own story the locomotive had not gone more than fifty yards before the accident happened (Record, p. 60), it must be clear, to say the very least, that there was enough evidence entitling the defendant to have the question of plaintiff's knowledge of the condition of the track submitted to the jury.

The allegation of the answer is, that he knew the condition of the track; that was a material allegation upon which issue was made. The defendant certainly had a right to prove this allegation or give evidence tending to prove it. Can it be said that the evidence given did not tend to prove that plaintiff knew the condition of the road. He walked up the track from his camp, and for nearly two hours walked around and across it. We respectfully ask what right had the court to say to the jury that there was no evidence in the case from which it can reasonably be inferred that plaintiff assumed any risk or hazard of his employment. It was for the jury and not

for the court to say what could be reasonably inferred from the evidence. The question is not whether the evidence was sufficient to establish the defense, but whether or not there was any evidence which entitled the defendant to go to the jury upon the question of the plaintiff's knowledge of the track. Whether the evidence was sufficient or not was a question for the jury.

It seems to us that the evidence is not only sufficient, but makes it absolutely certain that plaintiff knew the character and condition of the road. The track where the accident happened was, it seems, built upon timbers across a slight depression. How could the plaintiff not know this? It is claimed that because the rails were laid on the ties inside the stringers, the road broke down. Anybody who looked at the track could see that it was constructed in this way. The question as to whether or not the defense set up by the defendant was a legal defense was not before the court, but the question before the court was, whether or not there was any evidence which the jury had a right to consider in support of that defense. Can it be successfully contended that the plaintiff took no greater risk in working on this temporary road, built exclusively for logging purposes, than he would have taken in working on a permanent road like the Southern Pacific, constructed for the transportation of passengers as well as freight. What and how much of a risk he took was for the jury to decide. We think it was clearly error under the circumstances for the court to say to the jury: "You will dismiss from your minds the consideration of "the second defense; that is, of whether plaintiff knew "of the condition of the roadbed, and therefore assumed

"the risk of working upon such locomotive engine"; which was equivalent to instructing the jury that they were not to consider any risk which the plaintiff took in working on this temporary logging road.

In the case of Washington & G. R. Co. v. McDade, 135 U. S. 554 (10 Sup. Court Rep. 1044), the court says: "As a general rule, the question of contributory negligence "is one for the jury under proper instructions by the court, "especially where the facts are in dispute, and the evi- "dence in relation to them is that from which fair-minded "men may draw different inferences. Upon every question "in the case—the safety or unsafety of the machinery, "the ignorance on the part of the plaintiff of the danger "of it, and the negligence of the plaintiff at the time of "the accident — the evidence was controverted and ren- "dered the case just such a one as this court in Jones v. "Railroad Co., *supra,* said, that 'a due regard for the "respective functions of the court and the jury would "seem to demand that these questions should have been "submitted to the jury.' In the language there used, 'We "see no reason, so long as the jury system is the law of "the land, and the jury is made the tribunal to decide "disputed questions of fact, why it should not decide such "questions as these as well as others'."

In the case of Railroad Co. v. Stout, 17 Wallace, 664, the court says: "We find accordingly, although not uni- "form or harmonious, that the authorities justify us in "holding in the case before us that although the facts are "undisputed it is for the jury, and not for the judge, to "determine whether proper care was given or whether they "establish negligence."

In 2 Redfield on the Law of Railways, star page 231, it is said: "And what is proper care will be often a ques-"tion of law where there is no controversy about the facts, "but ordinarily, we apprehend, where there is any testi-"mony tending to show negligence, it is a question for "the jury."

In the case of Detroit & Milwaukee R. R. Co. v. Steinburg, 17 Mich. 99, the court decided, Judge Cooley delivering the opinion (we quote from the syllabus): "When, "however, the question of negligence depends upon a dis-"puted state of facts, or when the facts, though not dis-"puted, are such that different minds might honestly draw "different conclusions from them, the court cannot give "such positive instructions, but must leave the jury to "draw their own conclusions upon the facts and upon the "question of negligence depending upon them."

In the case of Grand Trunk Railway Co. v. Ives, 144 U. S. 408 (12 Sup. Court Rep. 679), the court says: "The "policy of the law has relegated the determination of such "questions to the jury under proper instructions from the "court. It is their province to note the special circum-"stances and surroundings of each particular case, and "then say whether the conduct of the parties in that case "was such as would be expected of reasonable, prudent "men under a similar state of affairs. When a given state "of facts is such that reasonable men may fairly differ "upon the question as to whether there was negligence or "not, the determination of the matter is for the jury."

Again, in Gardner v. Michigan Central Railroad, 150 U. S. 349 (14 Sup. Court Rep. 140), the court says: "The "question of negligence is one of law for the court only

"where the facts are such that all reasonable men must "draw the same conclusion from them, or, in other words, "a case should not be withdrawn from the jury unless the "conclusion follows as matter of law that no recovery can "be had upon any view which can be properly taken of "the facts the evidence tends to establish."

In the case of Hedin v. R. R. Co., 26 Oregon, 161, the court says: "The question of negligence is generally one "of fact, and not of law. If there be any dispute as to "the facts, it is clearly a question for the jury; or, if there "be no dispute as to the facts, but there may reasonably "be a difference of opinion as to the inferences and con- "clusions deducible therefrom, it is the province of the "jury to determine the question." Authorities are cited to support this view.

The eighth specification of error may properly be considered in connection with the sixth. It relates to the measure of the damages to be awarded to plaintiff, if he is entitled to any recovery at all; but the particular portion of the charge against which this specification is directed reads as follows: "If you find that the plaintiff "was injured through the negligence of the defendant, as "in his complaint set forth, and that he has not contrib- "uted to his injury by any negligence on his part, then "you should find the amount of damages he has sustained."

Our objection to this portion of the charge is that by its omission of any reference to the question of plaintiff's knowledge (as alleged by us) of the condition of the track, and his consequent assumption of the risk incurred in going upon the engine, the court practically repeated to

the jury his instruction (at which the sixth specification of error is aimed) that they were not to consider this question.

VI.

Seventh and Sixteenth Specifications of Error

These two specifications are considered together, because they relate to the same instruction.

The court gave to the jury the following instruction, to which the defendant excepted, and the exception was allowed (Record, pp. 414, 438):

"If you find that the roadbed was unsafe and unfit for "the use to which it was put, the fact that it was only "temporary would not excuse the defendant from using "ordinary care in making it safe. If this roadbed was a "part of the defendant's equipment for the purpose of car-"rying on its business, the rule that ordinary care should "be used by defendant in constructing it would equally "apply, namely, that it should use ordinary care to see "that it was reasonably safe, the same as though it were "a permanent structure. The question, therefore, is not "whether such roadbed or track was temporary or other-"wise, but whether it was a part of defendant's equipment "used by defendant in the transaction of its ordinary busi-"ness of logging, and if you find that it was, then I instruct "you that it was the duty of the defendant to use ordinary "care to see that such roadbed or track was reasonably "safe, and a failure to use such ordinary care, if you find "there was such failure, would warrant you in finding the "defendant negligent in that regard."

We submit that while there is much in this instruction unobjectionable, yet, considered as a whole, it is misleading and must have created a wrong impression in the minds of the jury. When the court said that the defendant should use ordinary care to see that the road was reasonably safe, without regard to its being a temporary logging road, it was as if the court had said it must be as safe as though it was a permanent structure. The court certainly left an inference that this temporary road should be built with as much care as a permanent road. Whether this was intended or not no one can with certainty say from the language used by the court. But this language certainly suggests the idea that a temporary logging road should be as safe for persons riding upon it as a permanent passenger road. This is not correct in point of fact or as a proposition of law.

In the case of Michigan Central Railroad Co. v. Austin, 40 Mich. 247, in deciding that the plaintiff had no ground of recovery, the court said: "Austin was a switchman, "employed daily at this place, and with every means of "knowledge of the track possessed by anybody. He knew "that the track was rough, and that defective rails were "often put into the side-tracks, which were not used for "general business. He must have known that a road which "was thus rough and uneven would entail serious risks "on anyone standing on such a narrow footboard unless "he held on to the support provided. The risk of such a "track was one of the ordinary risks connected with his "employment. I do not think the evidence tends to show "that it is negligent for a railroad company to use rough

"material for its yard lines, and whether it was or not "Austin knew the ways of the road and ran the risk."

In the case of Demko v. Carbon Hill Coal Co., 136 Fed. Rep. 162, which was a case in which a brakeman sued the defendant company for an injury received by him in the derailment of cars, upon the alleged ground that the construction of the road, which was a logging road, was defective, this court, in deciding that the plaintiff was not entitled to recover, Judge Gilbert delivering the opinion, said: "The defendant in error is not to be "held to the same accountability in constructing a logging "road used solely for its own purposes, and on which no "freight or passengers are carried, that would apply to the "case of an ordinary railroad."

In the case of Wade v. L. & M. Cypress Lumber Co., 74 Fed. Rep. 517, the mother of a blacksmith in the employ of the defendant corporation sued it for damages for his death, which had resulted from injuries received while traveling on a train over its road, through the defective construction of the road; and in this case the Court of Appeals for the Fifth Circuit approved an instruction to the jury by the court below as follows: "That under the "uncontradicted facts in this case, and under the proof "made by the plaintiff herself, this road was not a public "carrier, either under the constitution of this state or "any other law. It is a private railroad, built, as shown "by the plaintiff herself, upon the private lands of this "defendant company, for its own private purposes and "business in connection with its sawmilling operation. I "again repeat to you that it is not a public carrier, and "therefore the law which applies to the obligations and

"duties of public carriers does not bear upon the case "which is now presented for your consideration."

See, also, Batterson v. Chicago & Grand Trunk Ry. Co., 53 Mich. 125.

VII.

Ninth Specification of Error.

The court refused to give the jury the following instruction requested by defendant (Record, pp. 416, 440): "It "is not everyone who suffers loss from the negligence of "another who may recover. Negligence, to be actionable, "must occur in the breach of a legal duty, owing from the "negligent party to the party sustaining the loss."

This would seem to be a plain proposition of law, and it is difficult to conceive any reason why it should not have been given. It is perfectly clear that one may suffer from the negligence of another and be without remedy, as in a case where the plaintiff in a suit is a trespasser or is guilty of contributory negligence. The main question in this case is whether or not plaintiff was employed by defendant. Defendant contends that he was not employed, and that he was riding on the engine for his own purposes. Defendant was entitled to instructions from the court applicable to its standpoint in the case. It is evident that if plaintiff was not employed by defendant, but was riding on the engine for his own convenience, defendant was under no legal obligation to provide for him any road different from or better than the one on which plaintiff was injured. If plaintiff had no business on the engine, as according to testimony for the defendant he himself admitted, he took his chances in riding upon such a road.

In the case of Washington & G. R. Co. v. McDade, 135

U. S. 554 (10 Sup. Court Rep. 1044), the Supreme Court says: "But if the employee knew of the defect in the "machinery from which the injury happened, and yet "remained in the service, and continued to use the machin- "ery, without giving any notice thereof to the employer, "he must be deemed to have assumed the risk of all danger "reasonably to be apprehended from such use, and is "entitled to no recovery. And further, if the employee "himself has been wanting in such reasonable care and "prudence as would have prevented the happening of the "accident he is guilty of contributory negligence, and the "employer is thereby absolved from responsibility for the "injury, although it was occasioned by the defect of the "machinery, through the negligence of the employer. The "state decisions in harmony with the principles laid down "by this court on this subject are too numerous for "citation."

In the case of Hoffman v. Dickinson, 6 Southeastern Reporter, 59, the court says: "A servant cannot recover "for an injury suffered in the course of his employment, "for a defect in machinery or appliances used by the mas- "ter, unless the master knew, or ought to have known, of "the defect, and the servant was ignorant of the defect, "or had not equal means of knowledge," and cites the following cases in support of this doctrine:

Hayden v. Manufacturing Co., 29 Conn. 548.
Connolly v. Poillon, 41 Barb. 366.
Byron v. Telegraph Co., 26 Barb. 39.
Ryan v. Fowler, 24 N. Y. 410.
Malone v. Hathaway, 64 N. Y. 5.
Walsh v. Valve Co., 110 Mass. 23.

Williams v. Churchill, 137 Mass. 243.
Railroad Co. v. Conroy, 61 Ill. 162.
Railroad Co. v. Shannon, 43 Ill. 338.
Railway Co. v. Troesch, 68 Ill. 545.
Cummings v. Collins, 61 Mo. 520.
Elliott v. Railroad Co., 67 Mo. 272.
Wonder v. Railroad Co., 32 Md. 411.
Perry v. Marsh, 25 Ala. 659.
Cooper v. Railroad Co., 24 W. Va. 37.

See also note at the end of the above case of Hoffman v. Dickinson.

Justice Bradley, in the case of Tuttle v. Detroit G. H. & M. Co., 122 U. S. 18, quotes Judge Cooley as saying: "The rule is now well settled that, in general, when a "servant in the execution of his master's business receives "an injury which befalls him from one of the risks incident "to the business, he cannot hold the master responsible, "but must bear the consequences himself."

VIII.

Tenth Specification of Error.

There was a question of fact in the case as to whether or not the road was constructed in a careless and negligent manner. Plaintiff introduced evidence to show that the road was constructed in such a manner, and defendant gave evidence to show that due and proper care had been used in the construction of the road. As the plaintiff's claim is based upon the fact that the road broke down, it is obvious that to entitle him to recover on that ground, it must appear that it broke down because it was built in a negligent and careless manner. All railroads are

liable to accidents, such as the spreading or breakage of rails, washouts, etc., but the railroad companies are not necessarily and *per se* liable for these accidents. There must be evidence in each instance that the casualty was due to carelessness or negligence. As applicable to this rule of law and common sense, and to the point in controversy, defendant asked the court for the following instruction, which was refused: "Even though you find from the "evidence that the plaintiff was employed at the time of "his injury as a fireman on defendant's locomotive, plain- "tiff cannot recover unless you find that his injury resulted "from the negligent and careless manner in which such "road was constructed by defendant." (Record, pp. 416, 441.)

See Duntley v. Inman, 42 Oregon, 334.

It seems to us that this instruction was a correct proposition of law, and was certainly pertinent to the issues in the case.

IX.

Eleventh Specification of Error.

The defendant requested the court to give the following instruction, which the court refused: "Even though "you should find that the plaintiff at the time of his "injury was employed as fireman on defendant's locomo- "tive, defendant was not an insurer of the safety of its "track, but was required to exercise ordinary care in "building the same and keeping it in repair; and if it has "used such ordinary care defendant is not liable from a "defect in such track or roadbed not discoverable by such "ordinary care." (Record, pp. 417, 442.)

The purport of the foregoing instruction is that defendant was not an insurer of the safety of the track, but was only required to use ordinary care in its construction, and was not liable for any defects not discoverable by ordinary care. The refusal to give this instruction conveyed an implication to the jury that the contrary to this was law; that is to say, that defendant was the insurer of the safety of the road, and was required to exercise extraordinary care in its construction, and to use extraordinary care to discover defects in the road. Such an impression, if made upon the minds of the jury, was not only illegal but manifestly unjust to the defendant.

In the case of Texas & F. F. Ry. Co. v. Barrett, 106 U. S. 617 (17 Sup. Court Rep. 707), the Supreme Court quotes with approval the following instruction given by the Circuit Court: "That the master is not the insurer "of the safety of its engines, but is required to exercise "only ordinary care to keep such engines in good repair, "and if he has used such ordinary care he is not liable for "any injury resulting to the servant from a defect therein "not discoverable by such ordinary care."

The instruction which the court refused to give in the case at bar is identical in meaning, and almost identical in language, with the instruction which the Supreme Court of the United States has pronounced to be a correct exposition of the law. We think that no additional argument is necessary to show that the court below committed an error in refusing to give the instruction requested by defendant.

X.

Twelfth Specification of Error.

Defendant asked the court to give to the jury the following instruction, which the court refused: "Even though "you find that plaintiff at the time of his injury was "employed as fireman on defendant's locomotive, the mere "fact that he was injured in consequence of a defective "track or roadbed will not entitle him to a recovery, but "plaintiff must in addition show that such defect resulted "from the failure of the defendant to exercise ordinary "care in the construction of its track or roadbed and in "the selection of the materials of which the same was "composed or in the employment of persons reasonably "skillful and competent to construct such a roadbed." (Record, pp. 417, 442.)

This instruction involved substantially the same question as that presented by the instruction quoted in the eleventh assignment of error. The point is, was defendant required to use more than ordinary care in the construction of its road? We think the authorities are conclusive to the effect that ordinary care was all that was required of defendant, and that if it used ordinary care in the construction of its road it is not liable for accidents resulting from defects in the roadbed. All that the builders of roads can be required to do is to employ persons reasonably skilful and competent for such work, and if they employ such persons they ought not to be liable for a defect in the work not discoverable without extraordinary care; as, for instance, dry rot in a railroad tie which is not discoverable from the external appearance of the tie.

XI.

Thirteenth Specification of Error.

The court refused to give the following instruction asked for by defendant: "Defendant is not required to adopt extraordinary tests for the discovery of defects in "the ties or other materials of its track or roadbed, but "it fulfilled its whole duty to the plaintiff, even though "you should find that he was employed as a fireman on "defendant's locomotive at the time of the injury, if it "adopts such tests as are ordinarily used by prudently con-"ducted railroads and surrounded by like circumstances." (Record, pp. 418, 443.)

This instruction presents the same point presented by the instruction quoted under the eleventh and twelfth assignments of error, and involves the question as to whether or not defendant was required to use extraordinary care in the construction of its road, or whether or not ordinary care in its construction was all that the law requires.

The foregoing instructions under the eleventh, twelfth and thirteenth assignments of error were predicated upon substantially the following facts:

Oliff Shepardson, an experienced builder of logging roads, who laid down the mud sills and stringers, describes in his testimony the manner in which the road was built. (Record, pp. 163, 170.) He says that he exercised his best judgment, and that the road was built in the manner customary in building such roads.

Thomas Story laid the ties of the road upon the stringers. His testimony upon this point is as follows (Record, p. 210):

"Q. I wish you would tell the jury what care you used "and what you did in putting down the ties and putting "on the rails, making that track ready for use?

"A. Well, those ties had been ties that had been used "in another roadbed, and I had taken the ties up and "picked out the best of the ties that were there and laid "them in such roadbed.

"Q. Did you lay these ties yourself?

"A. I was there, and superintended the laying of them.

"Q. What was done relative to the investigation of the "ties to see whether they were good or not?

"A. Well, I was there myself and inspected the ties. "Whenever I got a tie that didn't look good, I had a good "sharp pick there, and I would always pick around the "tie to see whether it was good and solid or not; every one "of them.

"Q. What was the condition of this place where this "accident happened before the accident, so far as you "know?

"A. Why, it was good.

"Q. Did it display to your knowledge any weakness?

"A. No, sir, it did not.

"Q. In driving the spikes, can you say whether or not "there was evidence of weakness found in the ties?

"A. No, sir. Those ties were just as firm and hard "to spike as any tie we ever had, new or old."

Various witnesses for plaintiff, who claim to have examined the broken ties after the accident, state that these ties were rotten. Evidently, however, the testimony of plaintiff's witnesses is exaggerated, for not only is it the fact, as disclosed by the evidence, that the locomotive

passed over this spur track (including the place where the accident occurred) three times previous to the accident, once with a loaded train of cars (Shepardson, Record, pp. 157, 158; Henderson, Record, p. 230), but this spur track continued to be used for several months after the accident. Mr. Henderson, vice president of the defendant company, states (Record, p. 234):

"Q. Was this road used afterwards?

"A. Yes, sir.

"Q. Did you not use this road afterwards, use the "same ties and equipment?

"A. Same ties, same rail. Not those that broke, of "course, but other ties.

"Q. Of the same kind that had been taken up from "the other road.

"A. Ties that were not broken were used.

"Q. How long were they used?

"A. Oh, we were probably through with them in a "couple of months after the accident. I don't recollect "the exact time. Some where—six weeks or two months."

See, also, testimony of plaintiff. (Record, p. 52.)

Mr. Henderson also says (Record, p. 231):

"I examined the ties after they were broken. I found "the ties broken square off. I found no rot, but evidently "the ties were brittle. The ties had been in use, I should "judge, about four years, on the ground."

And on cross examination he further states (Record, pp. 236, 237):

"Q. If those ties were laid down there so they went "past, so it let that rail come eight inches inside of the "stringer, with these ties that were there, that would be

"much weaker than if it were laid so that the rail came "right on top of the stringer, wouldn't it?

"A. It certainly would, yes, sir.

"Q. And if this had been laid down there at that time, "so that the rail came on top of the stringer, this accident "wouldn't have happened, would it?

"A. No, sir; it would have stayed all right.

"Q. The reason it did happen was because the rail was "in the inside, and when the weight of the engine came "they broke through?

"A. Evidently that was it.

"Q. That was the cause of the accident?

"A. No question about it.

* * * * *

"Q. Why did this break?

"A. Simply because there were defective ties.

"Q. That is the fact, is it, the ties were defective?

"A. It couldn't have been otherwise; the ties broke."

Plaintiff's counsel laid much stress upon these statements of Mr. Henderson, in the Circuit Court, and we presume that they will do the same in this court. And, indeed, Mr. Henderson's testimony cannot fail to impress the court as being that of a man who proposes to give the facts as he understands them, without equivocation and regardless of the consequences.

But this testimony does not establish that the ties were rotten, as plaintiff contends. On the contrary, Henderson expressly states that they were not rotten. Moreover, as we have seen, the engine had passed over this particular piece of track three times previously that morning, and the spur track continued in use, for several months after

the accident, which would scarcely have been possible if the ties had been rotten.

The question is not, however, as to whether the ties were rotten, but whether the defendant had exercised ordinary care in their use. There was certainly evidence tending to show that the spur track had been built by experienced builders, and that ordinary care had been exercised in the selection of the material. Oliff Shepardson and Story both testify in this regard. We claim that defendant was entitled to have instructions given which were applicable to its theory of the case.

The passages quoted from Henderson's testimony refer to conditions as they existed at the time of the accident, or immediately after the breaking of the ties. Those who built the spur track were instructed by the company to make it safe (Oliff Shepardson, Record, p. 163), and they testify that they used ordinary precautions to that end. The fact that the locomotive broke through the track is not conclusive of the fact that such precautions were not used. It is to be remembered that it was a temporary spur track, and that while all reasonable precautions for its safety were of course required of defendant, it was not necessary that it should be built as if it were to be a permanent main track.

The method adopted for the construction of the road was, first, to lay mud sills across the course of the proposed track. On these sills, stringers of fir or hemlock timber were then placed lengthwise. These stringers were of a character suitable for the work and were of varying lengths, from 30 to 100 feet. They were not all straight but some were crooked. Oliff Shepardson states (Record,

p. 163): "And we would lay them down and *I aimed to have them outside of the rails a little to give more base "for the track;* and their being crooked, some places the "rails would come nearly over the stringer, and other "places it would come inside of the stringer; but we aimed "to put the ties near enough together to make it safe."

Henderson states (Record, p. 231) that there were several ways of placing the stringers on the mudsills; sometimes they were lapped sideways; sometimes they were butted up; often they were notched out and put together; many different ways — whatever seemed to be the most convenient and strongest for the construction. In reply to a question by plaintiff's counsel as to the best method of laying the stringers, Henderson says (Record, p. 235): "Well, it is hard to tell which is "best. Usually we take the edge of the mudsill that is "there, and the size of the stick, etc. If they are too large "to lap, we very often butt them together, or have them "go sometimes laying one on top, and notching down half-"way—notching both ties halfway and laying down on top, "and sometimes notching in on the side."

This testimony clearly indicates that these logging roads are not built as ordinary railroads are; and it is not to be expected that they should be.

Henderson (Record, p. 237) further testifies:

"Q. There is no doubt about which would have been "the best way to build that, is there, Mr. Henderson.

"A. *We built all of our road just as that is built, and we operated it afterwards, and the road is still there, with "the ties on, where the rail sat inside as much on the "stringer as that did."*

In addition to the general statements regarding the construction of this and other logging railroads, we direct attention to these particular features:

1. That Oliff Shepardson, who built the road, aimed to place the stringers outside the rail a little, in order to give the track more base. Manifestly, there were and are many places where the rail is inside of the stringer.

2. That *all* of the road was built in the same manner as the spur track in question, and shows the rail inside the stringer. (Henderson, Record, p. 237.)

3. That these spur tracks were but temporary.

4. That plaintiff's donkey engine was located on a spur track like the one in question. (Plaintiff, Record, p. 75.)

When these circumstances are considered in connection with the length of plaintiff's employment, nearly a year; that for nearly two hours on the morning of the accident he had hung around the work, crossing and recrossing the track, all the time being within fifty yards of the place of the accident, which occurred after the engine had gone about fifty yards; and that he had walked up the track, passing over or by the place in question; the conclusion, it seems to us, is irresistible, that plaintiff knew how the road was constructed, and that the rails were inside of the stringers, and was perfectly familiar with the condition of the track where the accident occurred; or, to put it mildly, the evidence was of such a character that defendant was entitled to have the question of plaintiff's knowledge submitted to the jury, and it was prejudicial error on the part of the learned judge who tried the case to take that question away from the jury, as he did by his charge.

XII.

Fourteenth Specification of Error.

Defendant asked the court to give the following instruction, which the court refused: "The jury in consid-"ering the question of negligence in the construction and "operation of the road must have regard to the fact that "the road was a temporary road constructed and operated "exclusively for the transportation of logs, and that de-"fendant would only be required to construct and operate "a road with ordinary care suitable for such purpose." (Record, pp. 419, 444.)

We cannot see that the correctness of this instruction can be made plainer than it is by the terms in which it is expressed. The fact that this road was a temporary road, constructed exclusively for logging purposes, was a controlling factor in the case. There was danger that the jury might be influenced by argument and authorities applicable to a permanent road, and we were entitled to have the distinction between the two classes of roads kept clearly before their minds.

See authorities cited under heading VI.

XIII.

Fifteenth Specification of Error.

We contend that the court erred in refusing to instruct the jury to find for the defendant, as it was requested to do by defendant. We submit that the evidence shows that plaintiff was not employed by defendant as fireman or otherwise at the time of the accident, and refer to our compilation of the evidence on this point in the "statement of the case" at the commencement of our brief.

We think that the excessive verdict in this case was clearly against the weight of the evidence, and was given under a mistake of law; and we ask this court to correct the error of the Circuit Court by reversing the judgment and directing a new trial.

Respectfully submitted.

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